

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

JAN 28 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Reexamination of the Comparative)
Standards for Noncommercial)
Educational Applicants)

MM Docket No. 95-31

To: The Commission

**JOINT COMMENTS OF NATIONAL PUBLIC RADIO, INC.,
THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS AND
THE CORPORATION FOR PUBLIC BROADCASTING**

Neal A. Jackson
Vice President for Legal Affairs,
General Counsel and Secretary
Mary Lou Kenny
Vice President of Member and Program
Services
Betsy Laird
Director, National Affairs
Gregory A. Lewis
Associate General Counsel
Michelle M. Shanahan
Assistant General Counsel
NATIONAL PUBLIC RADIO, INC.
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 414-2000

Marilyn Mohrman-Gillis
Vice President, Policy and Legal
Affairs
Lonna M. Thompson
Director, Legal Affairs
ASSOCIATION OF AMERICA'S
PUBLIC TELEVISION STATIONS
1350 Connecticut Avenue, N.W.
Washington, D.C. 20036

Kathleen Cox
General Counsel and Corporate Secretary
Robert M. Winteringham
Staff Attorney
CORPORATION FOR PUBLIC BROADCASTING
901 E Street, N.W.
Washington, D.C. 20004-2037
(202) 879-9600

January 28, 1999

No. of Copies rec'd
List ABCDE

049

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY.....	2
DISCUSSION.....	5
I. History Of Participation In This Proceeding By NPR, APTS and CPB.....	5
II. The Commission Should Adopt A Meaningful Point System To Resolve Mutually-Exclusive Applications For Reserved NCE Frequencies.....	6
A. Lotteries Will Not Serve The Needs and Interests of The Public, Will Encourage Abuse And Speculation, And Should Be Rejected.....	7
B. The Point System Should Consist Of Meaningful Criteria That Reward The Applicant Who Best Serves The Public Interest Goals Of Localism, Diversity And Spectrum Efficiency....	10
1. Localism Points.....	11
a. <u>Local headquarters credit</u>	11
b. <u>Local directors and officers credit</u>	15
c. <u>Local funding credit</u>	16
d. <u>Local educational presence credit</u>	16
e. <u>Representativeness credit</u>	17
f. <u>These localism criteria do not raise potential difficulties under <i>Bechtel</i></u>	19
2. Diversity Points	19
a. <u>Diversity of ownership credits</u>	21
b. <u>No credits for “local diversity”</u>	21
3. Spectrum Efficiency Credits	22

a. <u>Fair distribution of service credits</u>	22
b. <u>Technical differences credits</u>	23
c. <u>Governmental funding/PTFP eligibility credit</u>	23
d. <u>Facilities improvement credits</u>	24
C. A Similar Point System Should Apply To FM And TV Translators, With Priorities for Fill-In Service And Displaced Translators	25
D. In The Event Of A Tie, The Commission Should Rule In Favor Of The Applicant With The Fewest Pending Applications Rather Than Imposing A Time-Sharing Arrangement Or Adopting Other Tie-Breaking Measures	26
E. A Holding Period Will Ensure That The Use Of A Point System Results In Meaningful Service To The Public	28
F. Sufficient Information About The Applicants Must Be Available For Applicants To Confirm Competing Proposals	29
III. When An NCE Entity Is A Mutually-Exclusive Applicant For A Non-Reserved Frequency, The Commission Should Use A Special NCE Processing Track Or An NCE Reservation And Hybrid Point System Approach To Award The License	30
A. Subjecting NCE Applicants To Auctions Would Violate Both The Balanced Budget Act of 1997 And Public Policy.....	31
B. Finding NCE Entities Ineligible For Non-Reserved Channels Would Severely Limit The Availability Of Public Broadcasting Services.....	36
C. The Commission Should Adopt A Special NCE Processing Track Where One Or More Of The Applicants Is An NCE Broadcaster ..	38
D. In the Alternative, The Commission Should Allow NCE Stations To Reserve Additional Spectrum <u>And</u> Adopt A Hybrid Point System Approach	39
1. The Commission Should Permit NCE Entities To Reserve Additional Spectrum For NCE Use.	39

2. The Commission Also Should Adopt A Hybrid Point System Approach	41
3. Post-Point System Procedures	42
4. A Similar Point System Should Apply To FM And TV Translators, With Priorities for Fill-In Service And Displaced Translators	43
CONCLUSION	43

RECEIVED

JAN 28 1999

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Reexamination of the Comparative) MM Docket No. 95-31
Standards for Noncommercial)
Educational Applicants)

To: The Commission

**JOINT COMMENTS OF NATIONAL PUBLIC RADIO, INC.,
THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS AND
THE CORPORATION FOR PUBLIC BROADCASTING**

National Public Radio, Inc. ("NPR"), the Association of America's Public Television Stations ("APTS") and the Corporation for Public Broadcasting ("CPB") hereby submit their Joint Comments in response to the Further Notice of Proposed Rulemaking, released October 21, 1998, in the above-captioned proceeding (the "FNPRM").

NPR is a non-profit membership corporation that produces and distributes noncommercial educational programming through approximately 600 public radio stations nationwide. Among its award-winning programs are *All Things Considered*®, *Morning Edition*®, *Talk of the Nation*®, and *Performance Today*®. NPR also operates the Public Radio Satellite Interconnection System and provides representation and other services to its member station licensees.

APTS is a non-profit membership organization whose members comprise nearly all of the nation's 353 public television stations. APTS represents its membership on a national level by presenting the stations' views to the Commission, Congress, the Executive Branch and to other Federal agencies and policy makers.

CPB is the private, non-profit corporation authorized by the Public Broadcasting Act of 1967 to facilitate and promote a national system of public telecommunications. Pursuant to its authority, CPB has provided millions of dollars of grant monies for support and development of public broadcasting stations and programming.

INTRODUCTION AND SUMMARY

In the FNPRM, the Commission has sought further comment on its continuing effort to determine appropriate standards for choosing among mutually-exclusive applications for noncommercial educational ("NCE") broadcast licenses. The Commission also has sought comment on various alternatives for resolving competing applications between commercial and NCE entities for non-reserved frequencies, a process begun in the FCC's 1997 auction proceeding.

NPR, APTS and CPB submit these Joint Comments in support of the Commission's efforts to adopt a mechanism for resolving mutually-exclusive applications involving NCE applicants that advances the public interest. Since the Commission has made it clear that it no longer intends to use comparative hearings in any form, NPR, APTS and CPB urge the Commission to adopt a point system rather than a lottery as the mechanism for resolving mutually-exclusive applications among NCE broadcasters. The point system recommended by NPR, APTS and CPB offers an objective and streamlined method for selecting the applicant that will best serve the Commission's public interest goals of localism, diversity and spectrum efficiency. A lottery, on the other hand, will encourage speculation and otherwise disserve the public interest.

NPR, APTS and CPB believe that a point system that uses the following criteria for full-service broadcast stations, will best serve the Commission's public interest goals:

- a local headquarters credit (one point)
- a local directors and officers credit, where at least 75% of the directors and officers are local (one point)
- a local funding credit, where at least 50% of the expected funding is from local or public sources (one point)
- an established local educational presence credit (one point)
- a representativeness credit, for applicants with board members who are widely-representative of the local community (one point)
- a diversity of ownership credit, for applicants who own no more than 5 or 10 other radio stations or 5 or 10 other television stations (two points for 5 or fewer stations, one point for 10 or fewer stations)
- a fair distribution of service credit (two points for first NCE aural or video service in a community, one point for second NCE aural or video service in a community)
- a technical differences credit for materially greater technical proposals (up to two points)
- a credit for public funding or PTFP eligibility and application (one point)
- a facilities improvement credit (two points)

NPR, APTS and CPB suggest the use of a nearly identical point system to decide among mutually-exclusive applications for FM and TV translators. However, with FM translators the Commission should first compare only those applicants proposing a fill-in translator service or, if there are no such applicants, only those applicants proposing to replace a displaced translator in order to maintain an existing level of service. With TV translators, translators displaced due to the transition to digital television must be given priority.

In the event of a tie, NPR, APTS and CPB urge the Commission to award the license to the applicant with the fewest pending applications. If this still fails to break the tie, and the applicants cannot reach a settlement, then the Commission should use a random lottery amongst

the tied applicants to award the license. NPR, APTS and CPB also suggest a significant holding period to ensure that the point system results in a meaningful outcome for the public. Moreover, sufficient documentation should be filed in order to support claims for points or credits.

Where an NCE broadcaster is one of the mutually-exclusive applicants for a non-reserved frequency, the Commission should not resort to auctions to decide among the applicants. The Balanced Budget Act of 1997 exempts NCE broadcasters from auctions, regardless of whether the NCE applicant seeks a reserved or non-reserved frequency. In addition, subjecting NCE broadcasters to auctions would harm the public interest by effectively closing much of the broadcast spectrum to NCE entities, thereby limiting the diversity of voices and viewpoints available on the airwaves.

The Commission should not render NCE applicants ineligible for non-reserved spectrum in lieu of auctions. Such an action lacks any legal or policy basis. Moreover, it would abruptly halt the growth of public broadcasting and result in a downward spiral in the public's access to public broadcast services, in violation of congressional policy and the public interest.

Instead, the Commission should adopt the separate NCE processing track originally suggested by APTS. Once an NCE applicant files a technically-acceptable application for a non-reserved frequency, the channel should be deemed reserved for NCE use. At that time, only other NCE applicants would be permitted to file competing applications.

In the alternative, the Commission should adopt both of the following measures: (a) an expansion of the circumstances under which an NCE broadcaster can reserve additional spectrum for noncommercial use, and (b) a hybrid point system approach. Under a hybrid point system approach, the Commission should use a point system relevant to both NCE and commercial broadcasters to determine the most qualified applicant. If the NCE applicant is the most

qualified applicant under the point system, then it should receive the license. If a commercial applicant is the most qualified applicant under the point system, then the license can be awarded at auction.

DISCUSSION

I. History Of Participation In This Proceeding By NPR, APTS and CPB

Public broadcasters have participated actively in the Commission's NCE comparative standards and auction proceedings since their initiation. In response to a broad 1992 inquiry into changes to the commercial and noncommercial broadcast selection processes, APTS and NPR filed Joint Comments and Joint Reply Comments urging the Commission to maintain the existing NCE comparative hearing criteria, with several refinements to help ascertain the service that best meets community needs.¹ When the FCC separated the proceeding into two inquiries in 1995 -- one for reserved licenses and one for non-reserved licenses -- APTS and NPR filed Joint Comments and, together with numerous NCE licensees, Joint Reply Comments.² In these filings, the parties proposed detailed comparative criteria for ascertaining the best-qualified NCE applicant.

While the proceeding examining comparative standards for NCE applicants remained pending, the Commission proposed auctions as a means of resolving all competing applications for non-reserved frequencies.³ APTS filed Comments, and NPR, CPB and the National

¹ See Joint Comments of APTS and NPR in GC Docket No. 92-52 (June 2, 1992); Joint Reply Comments of APTS and NPR in GC Docket No. 92-52 (June 30, 1992).

² See Joint Comments of APTS and NPR in MM Docket No. 95-31 (May 15, 1995); Joint Reply Comments of APTS, NPR and various NCE Licensees in MM Docket No. 95-31 (June 7, 1995).

³ See Competitive Bidding for Commercial Broadcast and ITFS Service Licenses, Notice of Proposed Rulemaking, 12 FCC Rcd 22363 (1997).

Federation of Community Broadcasters (“NFCB”) filed Joint Comments, opposing the use of auctions when an NCE applicant applies for a non-reserved frequency.⁴ NPR, CPB, APTS and NFCB also filed Joint Reply Comments.⁵ In these filings, the parties explained that subjecting NCE applicants to auctions would violate both the Balanced Budget Act of 1997 and public policy.

II. The Commission Should Adopt A Meaningful Point System To Resolve Mutually-Exclusive Applications For Reserved NCE Frequencies

In the Further Notice, the Commission considered three options for comparing applicants for NCE spectrum: (1) traditional comparative hearings; (2) lotteries; and (3) a point system. It tentatively rejected traditional comparative hearings and decided to select either a lottery or point system.⁶ In earlier stages of this proceeding, NPR and APTS supported streamlined comparative hearings to resolve competing NCE applications. However, in light of the Commission’s opposition to the comparative hearing process and its interest in adopting either a point system or lotteries to resolve competing NCE applications, NPR, APTS and CPB urge the Commission to adopt a point system. The point system recommended below will result in the selection of applicants that will best serve the public interest, without the substantial delays and costs frequently associated with the comparative hearing process.⁷

⁴ See Joint Comments of NPR, NFCB and CPB in MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264 (January 26, 1998).

⁵ See Joint Reply Comments of NPR, NFCB, CPB and APTS in MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264 (February 17, 1998).

⁶ See FNPRM at ¶¶ 7-28.

⁷ See In the Matter of Amendment of Part 74 of the Commission’s Rules and Regulations in Regard to Instructional Television Fixed Service, Second Report and Order, 50 Fed. Reg. 26,736 at ¶ 39 (June 28, 1985) [hereinafter the ITFS Order] (noting that a point system provides a

A. Lotteries Will Not Serve The Needs and Interests of The Public, Will Encourage Abuse And Speculation, And Should Be Rejected

The Commission should reject its proposal to use lotteries to decide among mutually-exclusive noncommercial educational broadcast applicants. Leaving these important licensing decisions to random chance would fail to serve the public interest. Lotteries would benefit lesser-qualified applicants and create opportunities for abuse and speculation. Moreover, the administrative efficiencies hoped for by the Commission would not be achieved.

The use of lotteries to decide among competing NCE applications will not assure that the winning applicant meets any public interest standards beyond the most basic qualifications. An applicant with no ties to a service area will have the same chance of winning a license as an applicant with significant ties to, understanding of and ability to address the needs of the service area. Even if the lotteries are weighted,⁸ a lucky applicant that receives none of the statutory lottery preferences could receive a license over an applicant that receives every lottery preference

meaningful comparison of applicants, “but with a less cumbersome and expensive procedure” than comparative hearings).

⁸ See FNPRM at ¶¶ 12-14. The two statutory lottery preferences for minority ownership and diversity of ownership fail to address adequately the qualifications required to provide the best noncommercial educational broadcast service. These preferences ignore the qualities of localism, representation of the diverse elements of the community, and fair distribution of NCE service that are so important to the establishment of a responsive public broadcast service. The minority ownership preference also suffers from Constitutional difficulties. See Adarand Constructors v. Peña, 515 U.S. 200 (1995). Furthermore, the diversification of ownership preference is harmful to the development of state-wide educational networks operating pursuant to state education plans. See FNPRM at ¶ 14. The station limits set out in the diversification of ownership preference also are so low that they penalize experienced public broadcasters who seek to extend their alternative service to an unserved or underserved community and are, in fact, the best qualified applicant. The inadequacy of these statutory preferences is reason enough to reject lotteries. Moreover, since any amount of adjustments to the lottery preferences will not guarantee that the best qualified applicant receives the license, the Commission should reject lotteries outright rather than trying to craft a more appropriate set of preferences.

and is thus deemed better qualified under the statutory standards. A grant of the license to the least qualified applicant hardly serves the “public interest, convenience, and necessity.”⁹

The use of lotteries to decide among mutually-exclusive NCE applicants also ignores Congressional policy regarding the distribution of NCE licenses. Congress has found that:

it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation.¹⁰

Congress also has established a national universal service policy to make public telecommunications services available throughout the United States.¹¹ A system of lotteries will neither promote responsive, diverse NCE service of high quality nor assure the fair and universal distribution of NCE service. Thus, the Commission should heed the view of Senator Hollings (D-SC) in opposition to lotteries for NCE licenses: “I urge the FCC to develop appropriate criteria to assign these [public broadcast] licenses. The local communities deserve the right to have qualified public broadcast licensees. Public broadcasting is too important to leave to random chance.”¹²

While benefiting lesser-qualified candidates, lotteries will also increase the likelihood of speculation and abuse in the NCE application process. Lotteries will encourage applicants to file

⁹ 47 U.S.C. § 309(a).

¹⁰ 47 U.S.C. § 396(a)(5).

¹¹ See 47 U.S.C. § 396(a)(7) (“it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States”).

¹² 143 Cong. Rec. S8396 (July 31, 1997).

as many applications as possible in order to increase their chances of receiving a license, instead of filing only those applications where they have identified a need for service and an ability to serve the needs and interests of the community.¹³ Lotteries also will encourage applicants to file applications that meet only a minimal level of acceptability. Applicants will have little incentive to ascertain the needs and interests of a proposed service area and to formulate a responsive programming service prior to filing, as many public broadcasters now do. Because of the lower costs of filing minimally-acceptable applications, NCE lotteries are likely to attract insincere applicants with intentions of selling the authorizations they receive through the lottery process.

For all the disadvantages of lotteries, there is no guarantee that lotteries will actually achieve administrative efficiencies. First, as the Commission has noted, the statutory weightings for lotteries face a high constitutional hurdle.¹⁴ The development of a sufficient record to support lotteries in the case of NCE applications could further delay, rather than expedite, the grant of NCE licenses. Second, speculation encouraged by lotteries would increase the number of filings before the Commission. The Commission would in turn need to examine each of these applications to ensure that they meet the basic qualifications.

The Commission has rejected lotteries in the past as a means of deciding among competing broadcast applications because of its concern “that any potential gains in efficiency that may be achieved by use of a lottery would be outweighed by the possible reduction in

¹³ If the Commission decides to adopt lotteries, it is essential that the Commission limit the number of lotteries in which applicants can participate within a given time period, as it has suggested. See FNPRM at ¶ 18. However, this measure would not completely discourage speculation, because applicants would still have an incentive to file as many applications as the limit permits.

¹⁴ See FNPRM at ¶ 12.

quality of broadcasting licensees and service to the public.”¹⁵ The Commission should again reject lotteries in the case of mutually-exclusive NCE applications for the same reasons.

B. The Point System Should Consist Of Meaningful Criteria That Reward The Applicant Who Best Serves The Public Interest Goals Of Localism, Diversity And Spectrum Efficiency

Contrary to a lottery, a point system grounded in meaningful criteria will result in the selection of the applicant that *best* serves the public interest. It will not encourage speculation, since applicants will be rewarded for proposals that demonstrate an ability to serve the public interest. Moreover, a point system can be administered in an efficient and expeditious manner.¹⁶

To be meaningful, the point system should award a license to the applicant that best serves the Commission’s public interest goals of localism, diversity and spectrum efficiency. Furthermore, the point system criteria must not be subject to easy manipulation. The point system recommended by NPR, APTS and CPB meets these requirements. On the other hand, we are concerned that the point system suggested by the Commission is incomplete and, without important modifications, could have unintended results.

¹⁵ In the Matter of Amendment of the Commission’s Rules to Allow The Selection from Among Competing Applicants for New AM, FM and Television Stations By Random Selection (Lottery), Order, 5 FCC Rcd 4002 (1990).

¹⁶ See ITFS Order, at ¶ 43 (“[T]he point system adopted in this Order will result in the expeditious processing of mutually-exclusive applications and the speed with which a lottery would result in a selection would not be significantly faster, if at all.”). The minor legislative adjustment that may be necessary to allow the Commission to delegate to staff the authority to examine applications under a point system should not be a significant hurdle. See FNPRM at n.22. The adjustment made to allow delegation of examinations under the ITFS point system involved the addition of just a few words and would serve as an appropriate model. See 47 U.S.C. § 155(c)(1); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

1. Localism Points

One of the primary goals of broadcast licensing policy is the promotion of localism.¹⁷ An applicant with substantial roots ties to the local community is in the best position to determine the diverse needs and interests of the service area and to provide programming and other services responsive to these diverse needs and interests, thereby serving two of the Commission's public interest goals. Accordingly, criteria focusing on an applicant's local ties should constitute a major component of any point system used to decide among competing NCE applicants.¹⁸

a. Local headquarters credit.

One point should be awarded to applicants that have local headquarters. Entities can only designate one headquarters, however, so as to avoid manipulation of the credit. An applicant located in the area to be served is in the best position to ascertain and address the diverse needs and interests of that area.¹⁹ The experience of public broadcasting demonstrates this fact. The majority of public broadcasters are local,²⁰ and they provide a significant amount of local

¹⁷ In the Matter of Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, Notice of Proposed Rulemaking, CS Docket No. 98-201, 1998 FCC LEXIS 5874, 37 (1998); In the Matter of the Review of the Commission's Regulations Governing Television Broadcasting, 7 FCC Rcd 4111, 4115 (1992); 47 U.S.C. § 396(a)(5).

¹⁸ See, e.g., 47 C.F.R. § 74.913(b)(1) (awarding four points in the ITFS point system for local applicants).

¹⁹ See, e.g., ITFS Order at ¶ 16 (“[L]ocally based educational entities have been convincingly demonstrated by the commentors to be the best authorities for evaluating their educational needs and the needs of others they propose to serve in their communities.”).

²⁰ Public radio stations are licensed to the following predominantly local organizations: universities (362), non-profit community organizations (236), state governments (63), or local governments (33). Public television stations are licensed to the following predominantly local organizations: non-profit community organizations (136), state governments (123), universities (85) and local governments (8). See Corporation for Public Broadcasting, Frequently Asked Questions About Public Broadcasting (1997) (www.cpb.org/content/faq).

programming. Of the 633 public radio stations participating in a recent study, 100% air some local programming. On average, local programming constituted 50% of public radio stations' weekly broadcasts.²¹ In addition, 95% of all public television stations receiving CPB grants reported providing instructional service to schools during the 1995-1996 academic year, including 81% providing instructional programming to elementary schools and 79% providing instructional programming to secondary schools during that time period.²²

The Commission should define the term local, for this and the other localism credits described below, as follows: (a) located within 100 miles of the proposed facilities, or (b) located within the same state, or (c) if the proposed facilities are part of a "State-Wide Plan," located within the same state or a bordering community. A "State-Wide Plan" should be defined as an existing state-wide education plan of a state, municipality, state governmental agency, or public educational institution (i.e., a state university or public school system). To be considered local, the applicant and its parent entity or entities (including the ultimate parent) must also meet one of the above definitions of "local."²³

²¹ Public Radio Programming Study, Fiscal Year 1996, Research Note No. 105 (November 1997) (highlights at www.cpb.org), attached as Exhibit 1.

²² Elementary and Secondary Educational Services of Public Television Grantees: Highlights from the 1997 Station Activities Survey, Research Note No. 104 (November 1997), attached as Exhibit 2.

²³ A "Parent" of an applicant, in the noncommercial context, should be defined as an entity that selects or approves a majority of the directors and/or governing board members of the applicant or otherwise controls the applicant. Under the Intermountain Microwave standard, there are six indicia of control that guide an analysis of the actual control over an applicant. See Intermountain Microwave, 24 Rad. Reg. 983 (1963).

This definition of “local” is intended to reflect the actual ability of broadcasters to serve local needs and interests.²⁴ First, the 100-mile radius is important because the proximity of the applicant to the area to be served is likely to assure a noncommercial broadcast service responsive to the area of service. In addition, many existing public radio stations are often asked by outlying communities within 100 miles, which may or may not be in the same state, to establish a new full-service or translator station in their communities. These outlying communities often have interests that are shared with the applicant’s existing service area, but they are unable to receive the applicant’s existing signal because of distance or terrain.

Second, defining “local” to include the same state is important to include the many public broadcasters that are not owned by state or municipal governments, but that have established state or regional networks to address the needs and interests of their state residents. For example, the mission of Colorado Public Radio, a private, non-profit educational corporation, is “to create and distribute public radio programming for the people of Colorado.”²⁵ On its 5 full-service stations and 13 FM translator stations, it offers significant coverage of state politics, news and events throughout the state.²⁶ Often, these stations are the sole connection that some isolated communities have to the news and events of their state. A number of other public broadcasters

²⁴ The definition is broader than that used in the ITFS point system because of the differences in services, including broadcasting’s ability and obligation to cover a larger area than ITFS services.

²⁵ See Colorado Public Radio’s Mission Statement at www.cpr.org/about/index.htm.

²⁶ See www.cpr.org/about/index.htm (stating “Colorado Public Radio’s news effort focuses on three statewide news beats: education, government and the environment. Colorado Public Radio’s news hosts, three full-time reporters—two based in Denver, one in Grand Junction—and free-lance reporters based in Durango, Colorado Springs and elsewhere, provide stories from Denver to Grand Junction, from Pueblo to Steamboat Springs, from Lamar to Montrose and beyond.”)

licensed to private non-profit entities provide the same state-wide or regional services, such as Oregon Public Broadcasting, Minnesota Public Radio and St. Lawrence University's North Country Public Radio. Because of the ability of these networks to identify and serve the needs and interests of their state residents, Colorado Public Radio, Minnesota Public Radio, North Country Public Radio and other entities like them should be considered local throughout their states.

Third, the definition of "local" should include facilities operating under a State-Wide Plan because the state, state governmental agency or public educational institution with a State-Wide Plan is inherently local throughout its state.²⁷ Wherever the state's seat of government is located, it is obligated to serve the residents of that state wherever they may reside. State licensees will also possess significant connections to the communities in which they propose facilities and a unique ability to identify and serve the needs and interests of those communities. This unique ability is reflected in the extensive local programming of such state licensees as Maine Public Broadcasting, South Carolina Educational Radio Network, and Wisconsin Public Radio.²⁸ Defining state applicants as "local" also would encourage the development of state networks, which the Commission specifically supports.²⁹

In almost all cases, the proposed facilities of a state applicant will be located within the same state as the applicant; indeed, a state is unlikely to authorize the use of taxpayer money to

²⁷ For these reasons, in the ITFS point system, the FCC considered an entity to be local if created by a state or local government for the purpose of serving formal educational needs throughout the area over which the government's authority is intended to extend. See 47 C.F.R. § 74.932 n.1.

²⁸ Local program listings from these state television and radio networks are attached as Exhibit 3.

²⁹ See FNPRM at ¶ 14.

provide service in another state. However, there may be rare circumstances where a state may need to locate facilities in a community bordering its state in order to further its State-Wide Plan, to reach unserved residents in a particular area of its own state and to reach an unserved population with shared interests in bordering communities. If an application presents all of these circumstances, then the applicant should be considered “local” in the bordering community as well.³⁰

b. Local directors and officers credit.

The directors and officers of an applicant formulate and implement policies and decisions regarding service provided by a station. These policies and decisions are more likely to address the needs and interests of the service area if most of the directors and officers are “local.”³¹ Accordingly, the Commission should award one point to applicants (a) for which at least 75% of the officers and directors (or other members of the applicant’s governing body) are “local”, or (b) which are states, municipalities, state governmental agencies or public educational institutions. The directors and officers of a government-owned entity are inherently local within the entity’s geographic jurisdiction – again because a government is obligated to serve all of its residents wherever its authority extends.

³⁰ The Commission might consider withholding the local headquarters credit from the state applicant in a bordering community if its application is mutually exclusive with another applicant located within the same state as the proposed facilities.

³¹ Cf. 47 U.S.C. § 396(k)(8)(A) (requiring a licensee to make good faith efforts to establish a community advisory board “reasonably representative of the diverse needs and interests of the communities served by such station” in order to receive CPB funds).

c. Local funding credit.

The funding of station also reflects the station's responsiveness to the needs and interests of its community of license and service area. An applicant that receives the majority of its funding from the local area is more likely to be responsive to the needs and interests of that area than an applicant that is funded by an entity located across the country.³² Of course, there are some communities, particularly in rural areas of the country, that cannot afford to fund a much-needed station. These areas often look to CPB and/or public resources, such as state, municipal and/or PTFP funding, to supplement local funding. However, unlike funding from a distant private organization, such funding typically encourages local control.³³ Accordingly, the Commission should award one point to an applicant if at least fifty percent (50%) of the expected funding for the proposed facilities is from "local," CPB and/or public sources.³⁴

d. Local educational presence credit.

An established "local" educational organization should receive one point if it demonstrates that obtaining a license for the proposed facilities is important to achieving the organization's educational goals. Based on its experience in the community, the established "local" educational organization is in a better position than a newly-established organization to ascertain and address the needs and interests of the proposed service area. Moreover, the "local"

³² See Revision of Program Policies and Reporting Requirements Related to Public Broadcasting Licensees, 98 F.C.C.2d 746, 753-754 (1984) (noting that public broadcasters have a special duty to serve local needs and interests because a significant portion of the public broadcaster's budget is comprised of direct financial contributions from local audiences).

³³ See, e.g., 47 U.S.C. § 396(k)(8)(A); 15 C.F.R. § 2301.4(b) (description of PTFP priorities for local service); 15 C.F.R. § 2301.6 (requiring at least 25% local funding to receive a PTFP grant).

³⁴ In determining that a funding source is "local", a non-local entity must not be the guarantor or ultimate source of the funding.

educational organization may not be able to satisfy its educational goals outside of a small geographic area, while a distant educational organization may be able to satisfy its educational goals in many other locations.³⁵

The Commission should define an “educational organization” as an accredited educational institution, an educational or cultural organization owned by a non-profit corporation or a state, municipality, state governmental agency or public educational institution.³⁶ An organization must operate and provide educational or cultural services continuously for at least two years prior to filing an application to be considered “established.” The two-year benchmark will reward experience in a community and help prevent manipulation of the credit, without establishing too high a bar for newer entities with legitimate local educational goals.

e. Representativeness credit.

Lastly, the Commission should establish a representativeness credit, as it suggested.³⁷ However, this credit should apply to both radio and television. Radio stations, like television stations, are better able to address the diverse needs and interests of their service areas if their board members are widely representative of the local area. In addition, the credit should reward a baseline level of representation, rather than seek to differentiate among applicants whose leaders are more or less representative of the area. Otherwise, applicants would be encouraged to establish extremely large, unwieldy boards in order to beat out other applicants, and the

³⁵ See FNPRM at ¶ 24 & n.26.

³⁶ See 47 C.F.R. § 73.503.

³⁷ See FNPRM at ¶ 24.

Commission would be forced to make difficult judgment calls about which applicant is most representative of the community.

Accordingly, the Commission should award one point to applicants (a) with board members who are leaders (i.e., officers or directors) of at least five of the different “local” elements articulated in the “Community Leader Checklist,”³⁸ or (b) which is a state, municipality, state governmental agency, public educational institution or other accredited educational institution. To assure a broadly representative licensee, no individual board member should be credited with satisfying more than one “local” element. With respect to the second criteria, the board of stations licensed to governments and educational institutions, like the state or educational institution itself, is typically representative of and obligated to serve the interests of their constituent communities. Accordingly, it is appropriate to assume their broad representativeness.

³⁸ See id. at n.27. The traditional community elements are: (1) Agriculture; (2) Business; (3) Charities; (4) Civic, Neighborhood and Fraternal Organizations; (5) Consumer Services; (6) Culture; (7) Education; (8) Environment; (9) Government (local, county, state and federal); (10) Labor; (11) Military; (12) Minority and ethnic groups; (13) Organizations of and for the Elderly; (14) Organizations of and for Women; (15) Organizations of and for Youth (including children) and students; (16) Professions; (17) Public Safety, Health and Welfare; (18) Recreation; and (19) Religion. See In the Matter of Amendment of the Primers on Ascertainment of Community Problems by Commercial Broadcast Renewal Applicants and Noncommercial Educational Broadcast Applicants, Permittees and Licensees, 76 F.C.C.2d 401(1980); Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418, 423 (1976). Some of these elements may not be practical for the recruitment of board members. For example, given many state lobbying laws and other governmental policies, it is often difficult to include a government leader on the board of a public broadcast station not licensed to a government entity. However, responsive applicants should be able to recruit five directors from among the 19 elements listed above.

f. These localism criteria do not raise potential difficulties under *Bechtel*.

The localism credits proposed by NPR, APTS and CPB, unlike the integration credit struck down in *Bechtel v. F.C.C.*, 10 F.3d 875 (D.C. Cir. 1993), do not raise potential difficulties. First, NPR, APTS and CPB propose a holding period that would require a winning applicant to maintain each of the factors for which it receives credit for an eight-year period. In *Bechtel*, the Court struck down the integration credit in important part because licensees who received authorizations as a result of an integration proposal had no obligation to remain integrated. 10 F.3d at 879. Second, there is substantial evidence that local licensees with significant ties to the community serve the diverse interests and needs of that community. Indeed, the *Bechtel* court recognized that “[f]amiliarity with a community seems much more likely than station visitors or correspondence to make one aware of community needs.” 10 F.3d at 885. Third, the localism points proposed by NPR, APTS and CPB do not include the “qualitative” nuances of the integration factor (such as number of hours spent in day-to-day management) that sometimes caused unintended and unreasonable results.

2. Diversity Points

Another primary objective of the Commission’s broadcast policy has been to maximize the diversity of ownership, points of view and programming available to the public.³⁹ Public broadcasters provide a critical contribution to the diversity of voices and programming available

³⁹ See, e.g. Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, Notice of Proposed Rulemaking, FCC 94-323 (Dec. 15, 1994) (citing core goal of “maximizing the diversity of points of view available to the public over the mass media”); Newspaper/Radio Cross-Ownership Waiver Policy, Notice of Inquiry 11 FCC Rcd 13003, 13005 n.5 (1996) (articulating the Commission’s primary concern with “diversity in ownership as a means of enhancing diversity in programming service to the public”).

to the public.⁴⁰ Therefore, the point system proposed by NPR, APTS and CPB includes credits for diversity. Specifically, NPR, APTS and CPB propose a structural diversity of ownership credit that will help achieve greater diversity of media ownership without penalizing local service or public broadcasting experience.

In earlier filings, APTS and NPR urged the Commission to give “comparative consideration and weight to noncommercial applicants that propose to increase the diversity of public broadcast programming.”⁴¹ NPR, APTS and CPB believe that increasing the diversity of NCE broadcast programming remains an important goal. However, it would be extremely difficult -- if not impossible -- for the Commission staff to decide, in the context of an objective point system, whether an applicant should be credited for proposing a programming service that is sufficiently diverse from existing services. In any event, the structural localism points described above, together with the diversity of ownership credit proposed in this section, will reward the applicant that is in the best position to identify and address the diverse needs and interests of a community, without forcing the Commission staff to make difficult judgment calls about an applicant’s proposed programming service.

⁴⁰ See 47 U.S.C. § 396(a)(5)-(6); Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants, 58 F.C.C.2d 526, 536 (1976) (finding that public broadcasters offer diverse programs that meet “cultural and informational interests often given minimal attention by commercial broadcasters”).

⁴¹ See Joint Comments of APTS and NPR in MM Docket No. 95-31 at 13-14 (May 15, 1995).

a. Diversity of ownership credits.

The Commission should award two points to applicants that (a) own five or fewer radio or five or fewer television stations, or (b) propose facilities that are part of a State-Wide Plan.⁴²

The Commission should award one point to applicants that own ten or fewer radio or ten or fewer television stations. This point structure will promote diversity of ownership and assist new broadcast entrants. At the same time, it will not penalize applicants with some experience in providing NCE service. Facilities that are part of a State-Wide Plan should receive two points because state licensees have a special interest in and responsibility for serving the diverse needs and interests of their jurisdictions.

b. No credits for “local diversity”.

The Commission should reject its proposal for a “local diversity” credit, because it would, in fact, *harm* the public interest objectives of localism and diversity. The Commission proposes to award two points to an applicant if the principal community contour of the proposed NCE station does not overlap the principal community contour of any commonly controlled broadcast station.⁴³ This local diversity credit would favor an applicant based 2,000 miles away from the community of license that owns hundreds of stations nationwide and knows little about the community over a local licensee that, at the request of and with support from the community of license, seeks to extend service from its one station to an outlying rural area that it already knows and partially serves. The local diversity credit also would favor the non-local applicant

⁴² For purposes of determining ownership diversity, the proposed point system would take into account other stations owned by any “parent” organization and any LMA or similar arrangements.

⁴³ See FNPRM at ¶ 21.

over the local applicant that seeks to respond to community interests and needs by establishing a much-needed second NCE service, such as a jazz format station. The Commission should avoid such harmful results by rejecting its proposed local diversity credit.

3. Spectrum Efficiency Credits

A third objective of communications policy has been to assure the efficient use of the spectrum.⁴⁴ Under Section 307(b) of the Communications Act, as amended, the Commission has an obligation to “provide a fair, efficient and equitable distribution of radio service.”

Accordingly, NPR, APTS and CPB suggest several criteria to help further these objectives.

a. Fair distribution of service credits.

As suggested in the FNPRM, the Commission should award two points to the applicant that proposes the first full-time NCE aural or first full-time NCE video service received by a community, and one point to the applicant that proposes the second full-time NCE aural or second full-time NCE video service received by a community.⁴⁵ These credits will help fulfill the Commission’s obligations under Section 307(b) of the Communications Act and carry out the Congressional policy of making public broadcast service available to all citizens of the United States.⁴⁶

The Commission should not adopt its proposal to award a point to the first local service licensed to a community, however. The use of this credit would encourage manipulation of the

⁴⁴ See, e.g., In the Matter of Advanced Television Systems And Their Impact Upon The Existing Television Broadcast Service, Fifth Report and Order, 12 FCC Rcd 12809, 12812 (1997); In the Matter of Revision of Rules and Policies for the Direct Broadcast Satellite Service, 11 FCC Rcd 1297, 1309 (1995).

⁴⁵ See FNPRM at ¶ 21.

⁴⁶ 47 U.S.C. § 396(a)(7).

process, causing some applicants to seek a small community with no other licensed broadcast stations, whether or not they intend to focus their broadcast service on the community. In addition, it would often breed nonsensical results if the community receiving its first licensed service already receives service from a multitude of NCE and commercial stations.

b. Technical differences credits.

The Commission also should award credits to applicants that propose substantially superior technical coverage, as the Commission has suggested.⁴⁷ Specifically, the Commission should award one point to an applicant that proposes a 10% or greater positive difference in the area and population to be served than a competing proposal. The area calculations should not include bodies of water or other uninhabited areas. If an applicant proposes to serve a 10% greater area and population than a second proposal, which in turn, is 10% greater than a third proposal, the first applicant should receive two points and the second applicant should receive one point. These credits carry out the Commission's spectrum efficiency objectives, while crediting only meaningful differences in service.

c. Governmental funding/PTFP eligibility credit.

The Commission also should award one point to applicants that receive state or local funding or are eligible to receive and have applied for Public Telecommunications Facilities Program ("PTFP") funding for the proposed facilities. First, if a state or local government has provided funding for the proposed facilities, it has determined, often on universal service grounds, that it is in the public interest to construct this facility to serve the proposed

⁴⁷ See FNPRM at ¶ 21.

communities. The Commission should credit these public interest determinations by state and local governments by awarding points for the receipt of such funding.

Second, the PTFP program was established to “extend delivery of public telecommunications services to as many citizens in the United States as possible by the most efficient and economical means.”⁴⁸ Since this carries out the Commission’s spectrum efficiency objectives, the Commission should award credit to entities that have applied for PTFP funding and meet the eligibility requirements for receipt of such funding.⁴⁹

d. Facilities improvement credits.

Two points should be awarded to an applicant that proposes a major modification to its existing full-power facilities in order to improve the technical service to its service area. For example, an applicant that seeks to move to an adjacent frequency in order to reduce interference with a co-channel station should receive a point over an applicant that filed a mutually-exclusive application to construct a new station. First, these credits will encourage the reduction of interference and the more efficient use of the spectrum. Second, these credits will reward the applicant with a history of service to its community of license that seeks to improve that service.

These points will be claimed in only a few of the mutually-exclusive applications before the Commission. Granting of these points will become even rarer if the Commission adopts its proposals to expand the definition of a minor change for NCE FM stations and to extend the application of first come/first served processing to minor changes applications by NCE FM

⁴⁸ See 15 C.F.R. § 2301.1(a).

⁴⁹ See, e.g., 15 C.F.R. §§ 2301.3, 2301.17(b)(1)-(2). No PTFP grant will be awarded until the PTFP administrator receives confirmation from the FCC that any necessary FCC authorizations will be granted. See 15 C.F.R. § 2301.18(d). Therefore, it is not practical to require receipt of

stations.⁵⁰ Nonetheless, the few applicants proposing facilities improvements to improve technical service to their service areas offer substantial benefits to the public which should be rewarded with an extra two points.

C. A Similar Point System Should Apply To FM And TV Translators, With Priorities for Fill-In Service And Displaced Translators

In the case of FM and TV translators, the Commission should use the point system described above, with a few exceptions. First, the Commission should not include the facilities improvement credit, which is inappropriate for these secondary services. Second, applicants proposing a fill-in service or replacement of a displaced translator should receive priority as the Commission applies the point system.

For FM translators, the Commission should first use the point system to compare only those applications that propose a fill-in service. Fill-in translator stations are important for full-service stations that are unable to provide service throughout their predicted contours, generally for reasons of topography. This conforms with the Commission's long-standing priority for fill-in translator services.⁵¹ It is also consistent with the fill-in service priority suggested by the Commission for FM translator lotteries.⁵² If there are no qualified FM translator applicants proposing a fill-in service, the Commission should then compare only those applicants proposing to replace a displaced translator in order to maintain an existing level of service.

PTFP funding in order to grant this credit.

⁵⁰ See In the Matter of 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, Notice of Proposed Rulemaking, MM Docket No. 98-93, FCC 98-117 ¶¶ 46-50.

⁵¹ 47 C.F.R. § 74.1233.

⁵² See FNPRM at ¶ 17.

With TV translators, the FCC should give priority to translators displaced as a result of the digital transition. In its Sixth Report and Order in the advanced television proceeding, the Commission decided to allow displaced television translator stations “to apply for a suitable replacement channel in the area without being subject to competing applications.”⁵³ Under the Sixth Report and Order, these applications would be considered on a first-come, first-served basis without waiting for a window to open. The priority proposed here is consistent with the Commission’s efforts to maintain existing levels of service when TV translators are displaced during the transition to digital television.

D. In The Event Of A Tie, The Commission Should Rule In Favor Of The Applicant With The Fewest Pending Applications Rather Than Imposing A Time-Sharing Arrangement Or Adopting Other Tie-Breaking Measures

If two or more applicants receive the same number of points, the Commission should award the license to the applicant with the fewest pending applications in the same aural or video broadcast service at the time of filing. This is more likely to advance the goal of diversity of ownership and programming. Furthermore, the applicant with fewer pending applications typically can meet its educational goals with only the few frequencies that it has sought, while the applicant with more pending applications can meet its educational goals even if a particular application is denied.⁵⁴ Moreover, the applicant with the larger number of pending applications, all things being equal, has a greater chance of securing a license elsewhere.

⁵³ See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order, MM Docket No. 87-268, ¶ 144 (rel. April 21, 1997).

⁵⁴ Cf. FNPRM at n. 26 (“Given a choice between two NCE applicants, one that can only meet its educational goals within a small specific geographic region, and one that can operate equally well from another location, we believe it is most efficient to give a preference to the local applicant”).

Examining the number of pending applications to break a tie also could help discourage speculative filings. However, to do so, the Commission must count the number of applications at the time of filing rather than at a later date. Otherwise, applicants might file a large number of applications, then withdraw certain applications once they assess the merits of the other mutually-exclusive applicants.

If the tied applicants have the same number of pending applications, then the Commission might consider giving the applicants the opportunity to reach a settlement.⁵⁵ If even these measures fail to decide the proceeding, the Commission should use a lottery to break the tie because the remaining applicants will be equally qualified to hold the license at this stage of the process.⁵⁶ The lottery should not be weighted because the point system already will have assessed the relative merits of the applicants.⁵⁷

In any event, the Commission should reject its proposal to require applicants to share a channel in case of a tie.⁵⁸ Mandatory channel-sharing arrangements force organizations with different objectives, audiences, staffing, program policies and approaches toward funding station operations to share a frequency. These arrangements prevent stations from developing a solid public identity and consistent program schedule, thereby resulting in listener confusion, a

⁵⁵ See 47 C.F.R. § 74.913(d) (allowing settlements if the ITFS point system results in a tie).

⁵⁶ See FNPRM at ¶ 27.

⁵⁷ A legislative change may be necessary to permit unweighted lotteries in these very limited circumstances. This could be accomplished in connection with the legislative change to permit Commission staff to apply the ITFS point system pursuant to delegated authority. See *supra* n.16; FNPRM at n. 22.

⁵⁸ See FNPRM at ¶ 26.

reduction in listenership and listener loyalty and support, and a reduction in the ability of the station to respond to community interests and needs.⁵⁹

The Commission also should reject the use of a finder's preference as a tie-breaker for both full-service and translator stations. As the Commission stated, a finder's preference raises concerns about a "land rush" for noncommercial frequencies.⁶⁰ This threat is no less serious in the FM translator services where, based on a recent count, several applicants have over 100 applications pending. Likewise, the Commission should not use factors such as local presence, state-wide plans, or representativeness of leadership to break a tie.⁶¹ These factors are more appropriate for direct use in a point system.

E. A Holding Period Will Ensure That The Use Of A Point System Results In Meaningful Service To The Public

NPR, APTS and CPB wholeheartedly agree with the Commission's proposal to establish a holding period for NCE licenses awarded on the basis of point system preferences. During the holding period, the winning applicant must hold the license and maintain the factors for which it received preferences. To enforce this holding period, the winning applicant must certify annually to its continued eligibility for the points it received.⁶²

⁵⁹ See Joint Comments of APTS and NPR in MM Docket No. 95-31 at 17-18 (May 15, 1995). Notwithstanding the foregoing, if applicants determine that they can settle a tie through a time-sharing arrangement, they should be permitted to do so. In these rare circumstances, the entities will have determined a way to resolve or minimize the negative effects of time sharing.

⁶⁰ See FNPRM at ¶ 25.

⁶¹ See *id.* at ¶ 28.

⁶² See *id.* at ¶¶ 29-30.

The Commission should consider adopting an eight-year holding period, to coincide with the length of a full license term. This holding period could be waived only in extraordinary circumstances. However, absent resolution of its long-pending proceeding concerning transfers of control of non-stock entities,⁶³ the Commission should not consider a gradual change in the composition of the board -- an inevitable occurrence on a non-profit board -- as a transfer of a license, provided that the licensee maintains the factors for which it received points under the point system.

F. Sufficient Information About The Applicants Must Be Available For Applicants To Confirm Competing Proposals

To ensure the integrity of the point system process, sufficient information must be available to enable competing applicants and the Commission to confirm the accuracy of an applicant's point system credit claims and, if necessary, to challenge such claims. Therefore, once the Commission issues a public notice indicating the existence of mutually-exclusive NCE applications, the parties should be given 30 days to supply additional documentation in support of their credit claims. This documentation, if not already provided with the original application, should include: articles of incorporation, bylaws, the most recent audited financial statement or IRS Form 990, names and addresses of any parent entities, names and addresses of officers and directors, sources of funding for proposed facilities, a description of the "local" elements represented on the board (if a representativeness credit is claimed), a list of other station licenses and pending applications, engineering support for any fair distribution of service, technical differences or facilities improvement credits claimed, and documentation of government funding and/or PTFP application.

⁶³ Transfers of Control of Certain Licensed Non-Stock Entities, MM Docket No. 89-77.

After submission of all relevant information, parties should be given 30 days to file petitions to deny any of the competing applications. The Commission should use the same process it adopted for the ITFS point system to review these petitions to deny.⁶⁴ Only those petitions filed against the point system's tentative selectee should be reviewed by the Commission. When no substantial or material questions of fact are raised, the Commission should grant a license to the tentative selectee. If a petition to deny raises material questions of fact, the tentative selectee's application should be designated for hearing pursuant to Section 309(e) of the Communications Act. If the administrative law judge decides that the evidence requires the reduction of points or dismissal of the tentative selectee's application, the matter should be remanded to the Mass Media Bureau, which will then reapply the point system to the remaining mutually-exclusive applications. Since the foregoing process has not imposed any burden on the Commission or ITFS applicants, there is no reason to expect its application in this context to burden the Commission or NCE applicants.

III. When An NCE Entity Is A Mutually-Exclusive Applicant For A Non-Reserved Frequency, The Commission Should Use A Special NCE Processing Track Or An NCE Reservation And Hybrid Point System Approach To Award The License

In the FNPRM, the Commission also proposes a number of options for resolving competing applications for non-reserved frequencies where one or more of the applicants is an NCE entity. The options include: (a) current or modified auction procedures, (b) reserving additional spectrum for NCE use, (c) finding NCE entities ineligible for non-reserved spectrum, (d) establishing a special NCE processing track, or (e) a hybrid procedure using a combination of a point system or lotteries and an auction. NPR, APTS, and CPB strongly oppose using auctions or finding NCE entities ineligible for non-reserved spectrum in order to decide among these

⁶⁴ See 47 C.F.R. § 74.912; ITFS Order at ¶¶ 63-64.

mutually-exclusive applications. The Commission should instead adopt a special NCE processing track when an NCE entity applies for non-reserved spectrum. In the alternative, the Commission should both permit the reservation of additional spectrum for NCE use and adopt a hybrid approach using the point system described below.

A. Subjecting NCE Applicants To Auctions Would Violate Both The Balanced Budget Act of 1997 And Public Policy

As Commissioners Furchtgott-Roth and Tristani stated in their Separate Statement to the FNPRM, “We believe that Congress’ mandate is clear: the Commission lacks authority to employ auctions to issue licenses to such [noncommercial educational broadcast or public broadcast] stations, regardless of whether they operate on a reserved or on a commercial frequency.”⁶⁵

The Balanced Budget Act of 1997 provides that the competitive bidding authority granted by the Act “shall not apply to licenses or construction permits issued by the Commission ... for stations described in section 397(6) of this Act.”⁶⁶ Section 397(6) of the Communications Act refers to a “television or radio broadcast station” which:

- (A) under the rules and regulations of the Commission in effect on November 2, 1978, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or

⁶⁵ See FNPRM, Separate Statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani, at 1; see also Competitive Bidding for Commercial Broadcast and ITFS Service Licenses, First Report and Order, MM Docket No. 97-234, FCC 98-194, Separate Statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani, at 1 (August 18, 1998).

⁶⁶ Balanced Budget Act of 1997, Section 3002(a)(2), Pub. L. No. 105-33, 111 Stat. 258 (codified as amended at 47 U.S.C. § 309(j)(2)(C)).

(B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes.⁶⁷

Section 397(6) is *not* limited to stations located on the few FM and television channels reserved for noncommercial educational broadcasters, but applies on its face to *all* noncommercial educational broadcasters regardless of their location on the AM, FM or television band.⁶⁸

Moreover, the legislative history underlying the auction provisions of the Balanced Budget Act demonstrates Congress's intent to exempt public broadcasting applicants regardless of whether the particular frequency applied for is in the reserved or non-reserved spectrum. The original House and Senate bills, which were not enacted, would have expressly limited the auction exemption to applications for "channels reserved for noncommercial use."⁶⁹ However, the House-Senate conference eliminated this distinction between reserved and non-reserved spectrum. Under well-established canons of statutory construction, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."⁷⁰ Accordingly, the auction exemption cannot be limited to reserved noncommercial frequencies.

As further evidence of Congress's intent to exempt all NCE broadcasters from auctions, it is important to note that the reservation of certain channels for noncommercial use is not a

⁶⁷ 47 U.S.C. § 397(6).

⁶⁸ See Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) ("[W]hen a statute speaks with clarity to an issue ... inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.").

⁶⁹ S. 947, 105th Cong., 1st Sess., § 3001(a)(1) (not enacted); H.R. 2015, 105th Cong., 1st Sess., § 3301(a)(1) (enacted as amended).

⁷⁰ Russello v. United States, 464 U.S. 16, 23-24 (1983).

function of Federal statutory law, but of FCC rules. These rules, which were designed to guarantee the availability of a minimum, rather than a maximum, of spectrum for public broadcasters, permit public broadcasters to operate throughout the broadcast spectrum. The Commission routinely issues licenses and construction permits to stations described in Section 397(6) throughout the AM, FM and TV spectrum upon the simple filing of an application demonstrating the applicant's eligibility for an NCE broadcast station.⁷¹ NCE FM stations operating on non-reserved channels are governed by the same rules that are applicable to NCE FM stations in the reserved band, with the exception of certain technical rules.⁷² Moreover, NCE FM translators are defined as any "FM broadcast translator station which rebroadcasts the signals of a noncommercial educational FM radio broadcast station," regardless of whether the translator or full-service station are located on the reserved or non-reserved band.⁷³ Thus, based on the plain language of the statute and Congressional intent, the Balanced Budget Act exempts from auctions all applications for new or modified NCE broadcast permits or licenses, whether or not the applications are for stations on reserved or non-reserved frequencies.

Not only would subjecting NCE entities to auctions violate the Balanced Budget Act of 1997, but it also would harm the public interest by restricting the diversity of voices and viewpoints available on the public airwaves. Access by public broadcasters to non-reserved spectrum is often essential in order to extend or even maintain public broadcast service. Yet, auctions would effectively close many of these frequencies to public broadcasters, who are in no

⁷¹ See 47 C.F.R. § 73.1690(c).

⁷² 47 C.F.R. § 73.513.

⁷³ 47 C.F.R. § 74.1201(c).

position to compete financially in auctions with commercial broadcasters for broadcast frequency assignments.⁷⁴

In the case of public radio, much of the reserved FM band is either filled or unsuitable for additional full-service or FM translator stations because of FCC rules requiring stations in the reserved FM band to protect against interference to television channel 6 stations,⁷⁵ the presence of other spectrum users,⁷⁶ or proximity to Canada or Mexico.⁷⁷ There are *no* reserved channels in the AM band. Thus, approximately 37 NPR members have established full-service NCE radio stations on the non-reserved FM band, and approximately 29 NPR members have established full-service NCE radio stations on the AM band.

Moreover, many NCE FM translators are located on the non-reserved band. For example, 12 of Minnesota Public Radio's 18 FM translators are currently located outside of the reserved FM band. These translator services are especially important to many rural and isolated

⁷⁴ Public broadcasters have tight budgets funded primarily through charitable contributions or government funding. Whatever extra money they have is reinvested in the production or acquisition of additional high-quality programming or will be used in the conversion to digital broadcasting. They cannot rely upon later profits to recoup an auction investment and would have serious difficulties finding a lending institution that would provide financing for an auction bid.

⁷⁵ See 47 C.F.R. §§ 73.525, 74.1205, 74.1202(b)(3).

⁷⁶ See 47 C.F.R. §§ 73.503(b), 74.1202(b)(3); Amendment of Parts of the Commission's Rules Governing Frequency Allocations and Radio Treaty Matters, 90 F.C.C.2d 507 (1982) (requiring Alaskan radio stations operating in the frequency band 88-100 MHz to protect against common carrier operations existing on the band prior to 1982).

⁷⁷ See 47 C.F.R. §§ 73.504, 74.1235(d). See also Letter from Charles W. Logan, Chief, Policy and Rules Division to Mr. Joel Lawrence Efrein, DA 98-2560 (Dec. 21, 1998) (denying petition to reserve FM channel 300 for very-low-power FM radio, stating "The FM broadcast spectrum is heavily used, with many stations operating on each and every channel. For most, if not all, existing stations, there are not alternate channels available to which they could move in

communities which otherwise would not receive public radio service. The list attached as Exhibit 4 of FM translators in each state licensed to CPB grantees demonstrates the importance of such services to states with significant rural populations and isolating terrain. Since FM translators are a “secondary” service, they frequently must be relocated in order to ensure that the translator does not cause any actual interference to a new or newly-modified full-service station.⁷⁸ If public broadcasters must participate in auctions every time they are forced to relocate an FM translator, there could be a downward spiral in public radio coverage and, as a result, a silencing of diverse programming in many parts of the country.

In the case of television, there are 15 full-service public television stations operating on non-reserved channels. Further, there are *no* reserved NCE channels for TV translators. Many of the 787 TV translators licensed to public television stations will be forced to seek new frequencies during the transition to digital television. These TV translators provide the only public television service available to at least 2,551,714 people.⁷⁹ If the Commission subjects NCE applicants to auctions, many of these people will lose access to a public television signal.

Public broadcasters make a critical contribution to the diversity of voices and programming available to the public. The Commission has found that public broadcasters offer

conformance with our rules”).

⁷⁸ See 47 C.F.R. § 74.1203.

⁷⁹ See Corporation for Public Broadcasting, Analysis of Impact of Elimination of Translators (September 1998), Memorandum from Jerry Ostertag, Manager, Station Development, CPB, to Doug Weiss, Vice President, Television Operations, CPB, attached as Exhibit 5. This is a very conservative estimate that does not include individuals served by translators used to fill in holes in a primary transmitter’s service area. If those individuals are included, it is likely that some undetermined percentage of the remaining 9,533,592 people served by translators also receive their only public television service from a TV translator.

diverse programs that meet “cultural and informational interests often given minimal attention by commercial broadcasters.”⁸⁰ Congress intended all citizens of the United States to have access to the diverse programming offered by public broadcasters.⁸¹ To maximize the diversity of voices and programming available to the public and to achieve Congress’ goal of universal public telecommunications service, public broadcasters must be able to continue expanding their services to reach additional unserved and underserved communities, as well as to preserve their current level of service. They can do that only if the Commission rejects the option of subjecting NCE entities to auctions.⁸²

B. Finding NCE Entities Ineligible For Non-Reserved Channels Would Severely Limit The Availability Of Public Broadcasting Services

The option of finding NCE entities ineligible for non-reserved channels altogether would be devastating to the public interest and must be rejected.⁸³ It would immediately halt the growth of public broadcasting and ultimately decrease the availability of public broadcasting, in violation of congressional policy and the public interest.

The proposal to find NCE entities ineligible for non-reserved channels is totally lacking in any legal basis or other support. The FCC reserved small portions of the spectrum for NCE

⁸⁰ Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants, 58 F.C.C.2d 526, 536 (1976).

⁸¹ See 47 U.S.C. § 396(a)(7).

⁸² See also Joint Comments of NPR, NFCB and CPB in MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264 (January 26, 1998); Comments of APTS in MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264 (January 26, 1998).

⁸³ Indeed, this option is worse for the public interest than the auction option. If the Commission adopts auctions, there may be some frequencies that are not subject to mutually-exclusive applications and thus may be obtainable by NCE broadcasters. If the Commission adopts the ineligibility option, even those frequencies will be unavailable to NCE broadcasters.

radio and NCE television in order to promote the development of noncommercial educational broadcasting,⁸⁴ not to restrict its development, as this proposal would accomplish. Also, as noted above, the portion of the FM band reserved for noncommercial use suffers from a number of interference problems.

Moreover, this proposal would severely restrict the diversity of voices and programming available to the public. As discussed in Section III.A. above, access to non-reserved frequencies is often essential in order to extend public broadcast services to unserved or underserved communities or even to maintain existing levels of service. Indeed, the Commission stated earlier in the FNPRM that “we are sensitive to the fact that some noncommercial educational radio and television stations may, for technical reasons, have no choice but to operate on unreserved frequencies.”⁸⁵ If the Commission decides to render NCE entities ineligible for non-reserved spectrum, it would halt all further development of the public broadcasting system and violate the Congressional goal of ensuring universal public telecommunications service.⁸⁶

Even if the Commission were to grandfather those NCE broadcasters already located on non-reserved frequencies, rendering NCE entities ineligible for non-reserved frequencies would ultimately decrease public broadcast coverage, by denying access to spectrum to replace spectrum used by current incumbent broadcasters. Thus, the Commission’s tentative conclusion

⁸⁴ See, e.g., Amendment of Section 3.606 of the Commission’s Rules and Regulations; Amendment of the Commission’s rules, Regulations and Engineering Standards Concerning the Television Broadcast Service, 41 F.C.C. 148, ¶¶ 33-53 (1952).

⁸⁵ FNPRM at ¶ 37.

⁸⁶ See 47 U.S.C. § 396(a)(7). Only 91% of all Americans currently receive one or more public radio signals. Corporation for Public Broadcasting, Frequently Asked Questions About Public Broadcasting, at 14 (1997).

that this option would have no significant impact on NCE stations already operating on commercial channels is entirely wrong.⁸⁷

First, the many TV translators required to seek new frequencies during the transition to digital television would be forced off the air, since there are no reserved frequencies for TV translators. In the Rocky Mountain states alone, approximately 95 public television translators located on Channels 60-69 will require replacement frequencies. Second, many licensees of FM translators located on the non-reserved band that are forced to relocate because of interference to new or newly-modified full-service stations will not be able to find another frequency in order to maintain existing service. Third, full-service television and radio stations currently located on non-reserved frequencies could be subject to auctions if they file a major modification application. Although most modification applications are not subject to competing applications, NCE stations would still be unfairly limited in their ability to modify their stations in order to better serve their listeners. Accordingly, the Commission must summarily reject the proposal to find NCE entities ineligible for non-reserved frequencies.

C. The Commission Should Adopt A Special NCE Processing Track Where One Or More Of The Applicants Is An NCE Broadcaster

Instead of adopting the auction or ineligibility options, the Commission should establish a special NCE processing track when an NCE entity applies for non-reserved spectrum, as APTS suggested in the auctions proceeding.⁸⁸ Specifically, once an NCE entity files a technically-acceptable application for a non-reserved frequency, the channel should be deemed reserved for

⁸⁷ See FNPRM at ¶ 39.

⁸⁸ See *id.* at ¶¶ 40-42; Comments of APTS in MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264 (January 26, 1998).

noncommercial educational use. Once reserved for NCE use, only other NCE entities could file applications for the frequency. The Commission would use the point system described above to choose between any competing NCE applications.

This special NCE processing track best carries out the intent of the Balanced Budget Act of 1997 exemption for noncommercial educational broadcasters. Public broadcasters typically file applications only after they have ascertained a significant need for service in that community. However, to discourage a significant reallocation of commercial channels to NCE use, the Commission could limit the number of applications that an NCE applicant may file under the special NCE processing track. To prevent NCE broadcasters from using the special processing track to acquire and sell licenses privately to commercial entities at a substantial profit, the Commission might simply prohibit transfers to entities for commercial broadcast operation.

D. In the Alternative, The Commission Should Allow NCE Stations To Reserve Additional Spectrum And Adopt A Hybrid Point System Approach

If the Commission does not adopt a special NCE processing track, it should adopt both of the following options: (a) allowing NCE broadcasters to reserve additional spectrum, and (b) a hybrid point system/auction approach.

1. The Commission Should Permit NCE Entities To Reserve Additional Spectrum For NCE Use.

First, the FCC should expand the circumstances under which an NCE broadcaster can reserve additional spectrum for noncommercial educational use.⁸⁹ Specifically, in addition to

⁸⁹ See FNPRM at ¶ 37. The FCC suggests this option in the event that it decides to subject NCE entities to auctions. If the Commission ignores the Balanced Budget Act of 1997 and public policy considerations and decides to subject NCE entities to auctions, then it also should expand the options under which an NCE entity can reserve spectrum for NCE use. However, this option is also appropriate if the Commission does not choose the auction or special NCE processing track options.

existing circumstances permitting reallocation of spectrum, the Commission should allow reservation of additional spectrum for NCE use in the event NCE entities would be precluded from serving their proposed communities of license using the reserved band by existing reserved band stations or pending applications. This would serve the public interest by increasing the diversity of voices and programming available to the proposed communities.⁹⁰

At the very least, the FCC should allow reservation of additional spectrum for NCE use in the event that “(a) the NCE entities would be precluded from serving their proposed communities of license using the reserved band by existing reserved band stations or pending applications, and (b) the proposed allotment would provide the first or second NCE aural or NCE video service received in the community,” as the Commission has suggested.⁹¹ This option would serve the diversity interests described above. It would also help fulfill the Commission’s Section 307(b) obligations and carry out the Congressional policy of making public broadcast service available to all citizens of the United States.⁹²

An NCE broadcaster that receives a license by reserving additional spectrum should be permitted to transfer the license to another NCE entity without restriction. On the other hand, it is appropriate to prohibit the applicant from transferring the license to an entity for operation as a commercial station. Thus, the NCE broadcaster might transfer the license to an entity for continue public broadcast operation or return the license to the FCC.

⁹⁰ See, e.g., Revision of Program Policies and Reporting Requirements Related to Public Broadcasting Licenses, 98 F.C.C.2d 746, 751 (1984) (noting that public broadcasters provide a “significant alternative programming designed to satisfy the interests of the public not served by commercial broadcasters”).

⁹¹ See FNPRM at ¶ 37.

⁹² 47 U.S.C. § 396(a)(7).

2. The Commission Also Should Adopt A Hybrid Point System Approach

In other cases, where prior reservation of a frequency does not occur, the Commission should undertake a hybrid approach using a point system to determine whether an NCE applicant is the best qualified applicant. If an NCE applicant is more qualified than all of the other commercial applicants, then the NCE applicant should receive the authorization. If an NCE applicant is not the most qualified applicant, then market forces can determine the outcome of the proceeding through the use of an auction. The hybrid approach would proceed as follows:

First, if there are multiple NCE applicants for a frequency, these NCE applicants should be compared using the point system described in Section II for competing NCE applications. The winning NCE applicant would then be compared with the commercial applicants for the frequency. Otherwise, the use of a point system applicable to both NCE and commercial applicants might result in the selection of an NCE applicant that is more qualified than the other commercial applicants but less qualified than the other NCE applicant according to the NCE point system standards.

Second, the Commission should use a point system relevant to both NCE and commercial broadcast services to compare the winning NCE applicant and all of the commercial applicants.

The point system should include the following credits:

- a. Local headquarters credit. (See Section II.B.1.a.)
- b. Local directors and officers credit. (See Section II.B.1.b)
- c. Local funding credit. (See Section II.B.1.c.)
- d. Diversity of ownership credits. (See Section II.B.2.a.)
- e. Fair distribution of service credits.

Unlike the NCE point system proposed by NPR, APTS and CPB, the fair distribution of service credit proposed here has two components. First, the Commission should award two points for the applicant – commercial or noncommercial – that proposes the first full-time aural or first full-time video service received by a community, and one point for the applicant that proposes the second full-time aural or second full-time video service received by a community. These credits would carry out the Commission’s obligations under Section 307(b) of the Communications Act, as amended. Second, the Commission should award two points for the NCE applicant that proposes the first full-time *NCE* aural or first full-time *NCE* video service, and one point to the applicant that proposes the second full-time NCE aural or second full-time NCE video service received by a community. (See Section II.B.3.a.). Although these credits could be awarded only to NCE applicants, they are appropriate to carry out the Congressional policy of making public broadcast service available to all citizens of the United States.

f. Technical differences credits. (See Section II.B.3.b.)

g. Facilities Improvement credits. (See Section II.B.3.d.)

3. Post-Point System Procedures

If, after applying this point system, the Commission finds that the NCE applicant is the most qualified to serve the public interest, then the NCE applicant should receive the FCC authorization. If the Commission finds using the point system that one of the commercial applicants is the most qualified to serve the public interest, then the Commission should hold an auction in accordance with the procedures set forth in its Competitive Bidding decision. A tie between the NCE applicant and one or more commercial applicants after application of the point system should be resolved using the same tie-breaking mechanisms as NPR, APTS and CPB propose in Section II.D. for ties between NCE applicants. The holding period described in

Section II.E. should apply to any NCE applicant that receives a license over commercial applicants as a result of point system preferences. Finally, applicants should have access to the same relevant information as described in Section II.F.

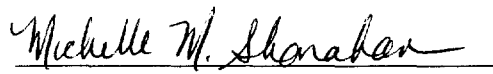
4. A Similar Point System Should Apply To FM And TV Translators, With Priorities for Fill-In Service And Displaced Translators

If an NCE entity is one of the competing applicants for an FM or TV translator on the non-reserved band, the Commission should use the same hybrid point system approach described above, with several exceptions. Like the point system used for competing NCE FM or TV translator applications, the Commission should not use the facilities improvement credit for secondary translator services. In addition, in the case of FM translators, the Commission should first use the point system to compare only those applications that propose a fill-in service. If there are no such applicants, the Commission should compare only those applicants proposing to replace a displaced translator in order to maintain an existing level of service. In the case of TV translators, the Commission should give priority to displaced TV translators.

CONCLUSION

For these reasons, NPR, APTS and CPB respectfully urge the Commission to adopt a meaningful point system, which selects the applicant that will best serve the FCC objectives of localism, diversity and spectrum efficiency, to resolve competing NCE applications. NPR, APTS and CPB further urge the Commission to reject auctions and spectrum restrictions when an NCE entity is one of the competing applicants for non-reserved broadcast spectrum. Instead, the Commission should adopt a special NCE processing track or a combination of (a) allowing NCE broadcasters to reserve additional spectrum, and (b) a hybrid point system approach.

NATIONAL PUBLIC RADIO, INC.



Neal A. Jackson

Vice President for Legal Affairs,
General Counsel and Secretary

Mary Lou Kenny

Vice President of Member and Program
Services

Betsy Laird

Director, National Affairs

Gregory A. Lewis

Associate General Counsel

Michelle M. Shanahan

Assistant General Counsel

635 Massachusetts Avenue, N.W.

Washington, D.C. 20001

(202) 414-2000

ASSOCIATION OF AMERICA'S
PUBLIC TELEVISION STATIONS



Marilyn Mohrman-Gillis

Vice President, Policy and Legal
Affairs

Lonna M. Thompson

Director, Legal Affairs

1350 Connecticut Avenue, N.W.

Washington, D.C. 20036

(202) 887-1700

CORPORATION FOR PUBLIC BROADCASTING



Kathleen Cox

General Counsel and Corporate Secretary

Robert M. Winteringham

Staff Attorney

901 E Street, N.W.

Washington, D.C. 20004-2037

(202) 879-9600

January 28, 1999